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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-24

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC.,
Petitioner,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONER

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September 28, 1977

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REPLY OF PETITIONER

Petitioner, The Board of Trade of Kansas City, Missouri, Inc. respectfully submits this Reply to the Brief and Memorandum in Opposition filed by Respondents.

I. Interest of Kansas City Board.

Chicago Board of Trade has attempted to belittle the intense interest of Kansas City Board in reversal of the decisions and orders below. Chicago Board suggests that Kansas City Board, and other shippers of grain and grain products, lacked earnestness in their efforts to alert the

Commission to the disastrous effects of its ruling and to urge the Commission to reconsider that decision (Brief, p. 12). So that our client's sincerity is clear to this Court, it must be pointed out that Kansas City Board (along with many other shippers) filed communications and petitions with the Commission seeking leave to intervene, reconsideration of the decision, or reopening of the proceeding. All of these communications and petitions were accepted for filing by the Commission and became part of the record before the Commission and on review. In view of the continuing participation of Kansas City Board in the review proceedings, it is highly inappropriate for Chicago Board of Trade to suggest that the serious disruption of the rate structure threatened by the decisions below is of little concern to Kansas City Board.

II. Consideration of the Public Interest.

Respondents' Briefs do not deny the importance of the level of railroad grain rates to the price of food and the stability and prosperity of the grain business. They do not deny that the grain trade has invested enormous sums of money in storage, processing, and distribution facilities in reliance on the grain rate structure and its provisions which allow movement of grain on low, through rates from producing origins to consuming destinations. Respondents also do not deny that the tremendous investments in grain futures contracts are profoundly affected by the stability and relative level of grain rates.

Despite these incontrovertible facts, Respondents' first position is that the disastrous effects on the public of the rulings of the Court of Appeals and the Commission are irrelevant to this case.

Kansas City Board submits that the very assertion that the public interest is irrelevant in a case involving

the vital grain rate structure is startling and directly contrary to *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942). That decision held that "The process of rate making is essentially empiric" and that questions relating to the grain rate structure should therefore be entrusted to the Commission to resolve in the exercise of its expert discretion (*id.* at 546). This Court unambiguously rejected the notion that the courts should substitute their own views of wise policy for those of the Commission where the complex system of grain rates and grain marketing is involved, and also rejected the idea that grain rate litigation should be decided without reference to the practical operation of the rate structure and the needs of the grain business.

Obviously uncomfortable with the position that the public interest is irrelevant (which is the position of the decisions of the Commission and the Court of Appeals), the Federal Respondents (and to a certain extent, Chicago Board of Trade) have now adopted in their filings with this Court a *second* position that, if the public interest is relevant, then it was considered.[1] This attempt to supply a basis of decision other than that chosen by the Commission is contrary to the decision of the Court of Appeals,

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1. The Federal Respondents imply that the Commission's statement that the rates were "unjustifiably discriminatory" was an evidentiary fact or an expression of a discretionary determination (Memorandum, p. 3). However, the Commission's finding of "unjustifiable discrimination" was nothing more than a statement of an ultimate legal conclusion which the Commission and the Court of Appeals believed to be compelled by *Mechling*. It did not flow from any exercise of transportation expertise or consideration of the public interest.

Chicago Board erroneously states that the Commission and the Court of Appeals gave "due consideration to the public interest" (Brief, p. 12). In fact, neither the Commission nor the Court of Appeals gave any consideration at all to the public interest because they erroneously believed that their decisions were compelled by *Mechling*.

to the Federal Respondents' own brief in the Court of Appeals,[2] and to the position advocated throughout this litigation by Chicago Board of Trade.[3] It also violates the rule of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that Commission decisions must be defended on the grounds adopted by the Commission and not by supplying new theories in appellate briefs. The Commission unquestionably exercised no discretion but instead concluded that its decision was required by *Mechling*.

III. Section 216 (c).

Our Petition argued that the Court of Appeals had failed to give effect to the Congressional policy against requiring truck-rail through routes (Section 216(c), 49 U.S.C. §316(c), Petition, pp. 17-20).

Respondents have failed to answer this point. They have chosen totally to ignore Section 216(c). Undoubtedly, that is because the Court of Appeals' decision has improperly "repealed" that policy of Section 216(c).

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2. In the Joint Brief of the United States and the Commission filed with the Court of Appeals, the United States argued that the Commission had exercised discretion in making its ruling below. The Commission refused to join this argument, thereby conceding that it had not exercised any discretion or employed any transportation expertise (Joint Brief of United States and Interstate Commerce Commission before the Court of Appeals, p. 16, p. 4).

3. Chicago Board of Trade has consistently argued that the Commission's decision below was "compelled" by *Mechling* as a matter of law.

CONCLUSION

Respondents' Briefs in Opposition present no arguments which would detract from the importance of review by this Court. Indeed, they reinforce our arguments that review is vitally important. Therefore, we respectfully pray that our Petition for Writ of Certiorari to review the judgment below be granted.

Respectfully submitted,

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